QUESTION PRESENTED

Whether the Federal Election Commission has statutory authority to represent itself in this Court in this case.

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STATUTES AND REGULATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1151

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

NRA POLITICAL VICTORY FUND, ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE FEDERAL ELECTION COMMISSION IN RESPONSE TO THE SOLICITOR GENERAL

STATUTORY PROVISIONS INVOLVED

Most of the relevant statutory provisions are reprinted in Appendix F (App. 42a-67a) of the Petition for Certiorari filed by the Commission on January 18, 1994. The original version of 2 U.S.C. § 437h (1970 ed. Supp. IV) is reprinted in the appendix at the back of this brief.

STATEMENT

The opinions below, the basis for jurisdiction, and the statement of the facts of this case are all set out in the Commission's Petition for Certiorari at pp. 1-11.

SUMMARY OF ARGUMENT

The Federal Election Commission was created in response to the Watergate crisis. In an effort to re-establish public confidence in the integrity of the federal election

system, Congress removed civil enforcement of the campaign financing statutes from the Department of Justice, which is subject to the partisan influence of the President, and entrusted it instead to an agency that is both independent and nonpartisan. Congress implemented this policy by giving the Commission "exclusive jurisdiction with respect to the civil enforcement" of the Federal Election Campaign Act ("the Act" or "FECA"), 2 U.S.C. § 437c(b)(1), including the authority "to initiate . . . defend . . . or appeal any civil action in the name of the Commission to enforce the provisions of this Act . . . through its general counsel," 2 U.S.C. § 437d(a)(6). The Commission has exercised this authority for almost two decades by conducting its own litigation in the Supreme Court without seeking authorization from the Solicitor General. This Court has never questioned, and no previous Solicitor General has ever objected to, the Commission's exercise of this statutory litigation authority.

Congress can, if it chooses, assign authority to conduct litigation in this Court to agencies other than the Solicitor General, and whether a particular statute does this is determined using "the ordinary tools of statutory construction," *United States v. Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988). In this case, the language of section 437d(a)(6), the structure and evident purpose of the Act, and the legislative history all support the conclusion that Congress intended to give the Commission complete control of civil litigation under the Act at all levels of the judiciary, without the supervision of the Department of Justice.

Since the critical statutory term "appeal" is not defined in the Act, it should be given its ordinary meaning, which includes all mandatory and discretionary procedures for review of lower court decisions. The term "appeal" and its derivatives are used in this way both in the Constitution and in other relevant statutes. Thus, the normal meaning of the statutory authorization to "appeal all civil cases"

includes seeking review of lower court decisions in this Court.

The structure of the Act confirms this meaning. The statute's overall design evidences an intent to entrust complete control of civil enforcement of the campaign finance laws, at both administrative and judicial levels, to a nonpartisan agency. More specifically, the *only* appeal available in cases litigated by the Commission under 2 U.S.C. § 437h is to this Court on petition for certiorari. Thus, applying the language of section 437d(a)(6) empowering the Commission to "appeal *any* civil case" arising under the Act to the procedures in section 437h necessarily results in the Commission's being authorized to file petitions for certiorari.

The legislative history of section 437d(a)(6) demonstrates that removing the civil enforcement of the Act in its entirety from the control of the Justice Department was the actual intent of Congress. The language in section 437d(a)(6) originated in a bill to create an independent Federal Election Commission adopted by the Senate in 1973, and the hearings and floor debates on that bill repeatedly stressed the intention to insulate enforcement of the Act from partisan influence by transferring it from the Justice Department to an independent and nonpartisan agency. A witness representing the Justice Department objected to the bill's transfer of Supreme Court litigating authority from the Solicitor General to the Commission, but the Committee neither disclaimed this view of the bill's purpose nor made any changes to accommodate the objection. Although the House failed to consider the 1973 bill, the statute finally enacted in 1974 incorporated most of its language establishing and empowering the Commission, and the only relevant change from the 1973 bill to the language now codified in 2 U.S.C. § 437d(a)(6) was to delete references to criminal prosecutions, which remained with the Justice Department. This shows the in-

tent of Congress to give the Commission, in section 437d (a)(6), control of all civil litigation arising under the Act, at all levels of the judiciary.

The Solicitor General relies in effect upon the general maxim *expressio unius est exclusio alterius,* pointing to the language of two other statutes administered by the Commission, 26 U.S.C. §§ 9010(d) and 9040(d), both of which explicitly authorize the Commission to file petitions for certiorari. This Court has previously noted the doubtful basis of the *expressio unius* maxim, and it certainly cannot overcome the force of the language, structure, and legislative history of the Act itself. That maxim is entirely inapplicable here because the provisions whose language the Solicitor General seeks to contrast are from separate statutes codified in different Titles of the United States Code, were drafted by different Congresses in different years, and were originally drafted to apply to different agencies of the government. The statutory scheme that would result from the Solicitor General's construction would create a senseless patchwork of conflicting and redundant litigating authority that cannot reasonably be attributed to Congress. Accordingly, the Solicitor General has failed to provide the substantial justification that would be required to reject the Commission's established construction of the Act and the unchallenged practice of almost two decades of litigation in this Court.

ARGUMENT

I. THE FEDERAL ELECTION CAMPAIGN ACT, IN 2 U.S.C. § 437d(a)(6), AUTHORIZES THE FEDERAL ELECTION COMMISSION TO CONDUCT LITIGATION AT ALL LEVELS OF THE JUDICIARY INDEPENDENT OF THE DEPARTMENT OF JUSTICE

> [I]t is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935). The Watergate crisis in 1973 demonstrated dramatically the danger to democratic government from this inherent conflict of interest faced by public officials subservient to the President. The public outcry over the disclosures of misuse of office by the Attorney General and other government officials to support the President's reelection campaign, and the firing of the Watergate Special Prosecutor on orders from the White House by the Solicitor General, serving as Acting Attorney General, *see generally* In re *Olson,* 818 F.2d 34, 41-42 (D.C. Cir. 1987), led to substantial remedial legislation.

Congress created the Federal Election Commission in 1974, in direct response to Watergate. Congress sought thereby to restore public confidence in the integrity of the election process by taking civil enforcement of the campaign finance laws out of the hands of the Justice Department and assigning it instead to an independent, nonpartisan agency. As the Solicitor General acknowledges (Br. 12-13), this congressional purpose is applicable to control of the Commission's litigation, most of which involves "issues charged with the dynamics of party politics," *FEC v. Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 37 (1981). The Justice Department's conflict of interest in this area is demonstrated most acutely by litigation the

Commission has conducted against the incumbent President's own campaign committee, In re *Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538 (D.C. Cir. 1980); *Reagan for President Comm. v. FEC*, 734 F.2d 1569 (D.C. Cir. 1984); *Reagan-Bush Comm. v. FEC*, 525 F. Supp. 1330 (D.D.C. 1981), and even against the Department of Justice itself. *Buckley v. Valeo*, 424 U.S. 1 (1976) (separation of powers issue); *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.) (en banc), *aff'd mem. sub nom. Clark v. Kimmit*, 431 U.S. 950 (1977); *Galliano v. United States Postal Service*, 836 F.2d 1362 (D.C. Cir. 1988).

Congress implemented this policy in 2 U.S.C. § 437c (b)(1), which grants the Commission "exclusive jurisdiction with respect to the civil enforcement" of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), 2 U.S.C. §§ 431-455. As part of that exclusive jurisdiction, Congress gave the Commission broad independent authority "to initiate . . ., defend . . . or appeal any civil action in the name of the Commission to enforce the provisions of this Act . . . through its general counsel," 2 U.S.C. § 437d(a)(6). It also authorized the Commission to both "appear in and defend against any action instituted under this Act" either "by attorneys employed in its office" or "by counsel whom it may appoint, on a temporary basis as may be necessary for such purpose," 2 U.S.C. § 437c(f)(4). Congress placed no specific restrictions on the Commission's civil litigating authority, and it made no provision for the Department of Justice to participate in any way in the civil enforcement of the Act.

The Commission has, as the Solicitor General concedes (Br. 8 n.6), consistently exercised this statutory authority by representing itself, without seeking the Solicitor General's authorization, in numerous cases before this Court during its 19 years of existence.[1] Neither this Court nor

[1] The Solicitor General's brief lists only cases involving both argument and decision on the merits. The Commission also represented itself in one case resolved after argument by an equally divided

any party in litigation has ever before questioned the Commission's authority to do so.

In fact, although the Commission has routinely provided copies of its Supreme Court briefs and petitions to the Solicitor General's Office, no previous Solicitor General has claimed a right under 28 U.S.C. § 518(a) to control the Commission's litigation in this Court.[2] " '[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.' " *Bankamerica Corp. v. United States*, 462 U.S. 122, 131 (1983) (quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 351 (1941)). The Solicitor General's " 'failure to use such a power for a long time indicates' " that the Solicitor General's Office, like the Commission, " 'did not believe the power existed.' " *Bankamerica*, 462 U.S. at 131 (quot-

Court, *Common Cause v. Schmitt*, 455 U.S. 129 (1982) (constitutionality of 26 U.S.C. § 9012(f)), and as appellee in three cases that resulted in summary affirmance: *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.), *aff'd mem. sub nom. Clark v. Kimmit*, 431 U.S. 950 (1977) (justiciability of a challenge to constitutionality of 2 U.S.C. § 438(d)); *International Ass'n of Machinists v. FEC*, 678 F.2d 1092 (D.C. Cir.) (en banc), *aff'd mem.*, 459 U.S. 983 (1982) (constitutionality of portions of 2 U.S.C. § 441b(b)); *Republican National Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), and 616 F.2d 1 (2d Cir.) (en banc), *both decisions aff'd mem.*, 445 U.S. 955 (1980) (constitutionality of 2 U.S.C. § 441a (b)(1)(B) and 26 U.S.C. § 9003(b)). The Commission has filed petitions for certiorari and briefs in opposition in numerous other cases without seeking authorization from the Solicitor General.

[2] In 1989, a Deputy Solicitor General inquired informally about the Commission's authority to file a brief as *amicus curiae* in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). The Commission's Associate General Counsel responded with a letter explaining the basis of the Commission's statutory authority to conduct its own litigation in this Court, and the Solicitor General did not object when the Commission filed its *amicus* brief. A copy of this letter is printed in the appendix to this brief.

ing *FPC v. Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 513 (1949)).

As with any issue of statutory interpretation, the Commission's consistent construction of 2 U.S.C. § 437d(a)(6) as authorizing it to conduct all of its own appellate litigation, including in this Court, is entitled to substantial deference, *FEC v. Democratc Senatorial Campaign Comm.*, 454 U.S. at 37. Such deference can only be enhanced by the Solicitor General's longstanding practice of acquiescing in the Commission's exercise of this independent litigating authority. *See FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986). The Commission's authority is by now so well established that the leading treatise on Supreme Court practice has concluded that section 437d (a)(6), like 26 U.S.C. § 9010(d), authorizes the Commission to "act through its own counsel, rather than through the Solicitor General, in mapping its appellate strategy." Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 68 n.56 (7th ed. 1993). The language, structure, and legislative history of the Act supply no justification for the sudden reversal of this practice represented by the Solicitor General's claim in this case of authority to control all of the Commission's litigation under the FECA in this Court.

A. The Language and Structure of the Act

In 28 U.S.C. § 518(a), Congress entrusted to the Attorney General and the Solicitor General the general authority to represent the federal government in litigation in the Supreme Court. The Court held in *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), that in the absence of any other applicable statute section 518(a) is controlling. However, the Court also noted that, the general authority granted by section 518(a) having been created by statute, "Congress, if it so chooses" can "exempt litigation from the otherwise blanket coverage" of section 518(a). *Id.* at 705 n.9.

The Court did not recognize in *Providence Journal* any presumption against statutory assignment of litigating authority to others, nor did it suggest that Congress would have to use particular technical wording or legislate with unusual clarity to accomplish this purpose. To the contrary, the Court specified that construction of such a statute would be based on application of "the ordinary tools of statutory construction to determine whether Congress intended" to exempt litigation from the otherwise blanket authority of the Solicitor General. 485 U.S. at 705 n.9. In fact, the Court noted three statutes that "suggest exceptions to the blanket coverage of § 518(a)," *id.*, none of which contained any express reference to section 518(a), the Supreme Court, or petitions for certiorari.

Providence Journal thus refutes the Solicitor General's argument (Br. 9), relying upon a decision involving the presumption against implied repeal of a statute, that there must be "clear and manifest" evidence of congressional intent to authorize independent litigation in this Court. Such a presumption has no role in resolving the issue presented here, involving the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination," *United States v. Fausto*, 484 U.S. 439, 453 (1988).[3] Reconciling a general provision like section 518(a) with the specific

[3] The presumption cited by the Solicitor General is only against "[r]epeal by implication of an express statutory text," because "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change." *Fausto*, 484 U.S. at 453. There is no express text in 28 U.S.C. § 518(a) referring to litigation under the FECA that would have to be changed to accommodate the narrow impact of section 437d(a)(6). Continued recognition of the Commission's independent litigating authority in this specific area would not affect the Solicitor General's authority under section 518(a) to represent the government in all cases that Congress has not assigned elsewhere, and even to represent the interests of "the United States," 28 U.S.C. § 518(a), in those cases the Commission litigates "in the name of the Commission," 2 U.S.C. § 437d(a)(6).

authority conferred upon the Commission by section 437d (a)(6) implicates instead "the principle that a more specific statute will be given precedence over a more general one." *Busic v. United States*, 446 U.S. 398, 406 (1980). *See also Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 375 (1990).

The language of section 437d(a)(6) is broad and unrestricted. It authorizes the Commission not only to "initiate" and "defend" in the first instance, but also to "appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel." The Act contains no provision assigning any role whatever in the Commission's civil litigation to the Solicitor General or any other officer of the Department of Justice. *Compare, e.g.*, 5 U.S.C. § 7105(h) (authorizing independent litigation by agency "[e]xcept as provided in section 518 of Title 28, relating to litigation before the Supreme Court"); 5 U.S.C. § 1204(i) (same); 42 U.S.C. § 7171(i) (same).

The critical statutory term "appeal" is not defined in the Act. The Solicitor General argues that this term should be confined strictly to its narrowest technical use in contrasting appeals of right from this Court's discretionary appellate jurisdiction, which would exclude from section 437d(a)(6) cases reviewed by this Court on petition for certiorari. However, the ordinary tool of construction applied by this Court is that "[i]n the absence of such a definition [in the statute], we construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 114 S.Ct. 996, 1001 (1994). *See also Smith v. United States*, 113 S.Ct. 2050, 2054 (1993).

The ordinary meaning of "appeal" in this context is given in *Black's Law Dictionary* (6th ed. 1990) (citations omitted):

> Resort to a superior (i.e. appellate) court to review the decision of an inferior (i.e. trial) court or administrative agency. A complaint to a higher tribunal of an error or injustice committed by a lower tribunal, in which the error or injustice is sought to be corrected or reversed. . . . There are two stages of appeal in the federal and many state court systems; to wit, appeal from trial court to intermediate appellate court and then to Supreme Court.

Id. at 96.[4] In fact, the Solicitor General's technical distinction conflicts directly with the ordinary meaning of "appeal," for *Black's* specifies that "an appeal may be as of right (e.g. from trial court to intermediate appellate court) or only at the discretion of the appellate court (e.g. by writ of certiorari to U.S. Supreme Court)." *Id.* at 96.[5] Thus, in common parlance, even among lawyers, the term "appeal" is used to denote both mandatory and discretionary procedures for seeking review of lower court decisions.

The term "appeal" and its derivatives are routinely used in this normal sense both in the Constitution and in relevant statutes. Article III, Section 2 of the Constitution vests only two kinds of jurisdiction in this Court, "original Jurisdiction" and "appellate Jurisdiction"; discretionary review of lower court decisions on writ of certiorari is thus part of this Court's "appellate" jurisdiction. In 28 U.S.C. § 594(a)(3), a provision of the recently expired Ethics in Government Act of 1978, Congress authorized an independent counsel to "(3) appeal[] any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity." Congress used this language, similar to that in 2 U.S.C. § 437d (a)(6), with the specific intent that "the authority given

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[4] *See also, e.g., Random House Dictionary of the English Language (Unabridged)* 72 (1983) ("*Law.* a. an application or proceeding for review by a higher tribunal"); *American Heritage Dictionary of the English Language (New College Edition)* 62 (1976) ("*Law. a.* The transfer of a case from a lower to a higher court for a new hearing").

[5] "Writ of certiorari" is similarly defined as "[a]n order by the appellate court which is used by that court when it has discretion on whether or not to hear an appeal from a lower court." *Black's Law Dictionary* at 1609.

in paragraph (3) to appeal any decision of a court includes taking an appeal to the Supreme Court without the permission of the Solicitor General," S. Rep. No. 95-170, 95th Cong., 1st Sess. 67 (1977).[6] Even 28 U.S.C. § 518(a), the basis for the Solicitor General's own litigating authority, does not mention petitions for certiorari but speaks generically, like the Constitution, of "suits and appeals." Since the Commission's construction of section 437d(a)(6) is the one that gives effect to the ordinary meaning of the statutory terms, it should receive the usual deference from this Court. *See* p. 8, *supra*.

The structure of the Act as a whole confirms that Congress intended the ordinary meaning of the words it used in section 437d(a)(6). First, the overall structure of the Act evidences Congress's particular concern about ensuring nonpartisan enforcement of the FECA by insulating the Commission from control by the President. Congress established the Commission in 1974 as a nonpartisan agency of six voting Commissioners, no more than three of whom could be of the same political party and only two of whom were to be appointed by the President. By requiring a majority vote of the Commissioners to authorize enforcement actions, Congress thus ensured that the Commission would be institutionally incapable of acting, or being used, in a partisan manner. *See generally, FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. at 37.[7] Congress also provided for congressional, rather

[6] It is noteworthy that the independent counsel, like the Commission, was established in response to Watergate as a remedy for the inherent conflict of interest in the Justice Department when activities of the President and his associates are at issue. *See* S. Rep. No. 95-170, at 5-7.

[7] *See* H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 140 (1974) (supp. views of Rep. Frenzel) ("The failure of the Justice Department to prosecute in 1972 is widely known. No administration or enforcement agency that is in any manner politically encumbered has ever done an adequate, consistent job in administering and enforcing election law").

than presidential, review of the Commission's proposed regulations, 2 U.S.C. § 438(d), gave the Commission authority to submit its own budget to Congress without presidential approval, 2 U.S.C. § 437d(d)(1), and precluded the President from controlling the Commission's submissions to Congress. 2 U.S.C. § 437d(d)(2).[8] In 1979, Congress exempted the Commission from the senior executive service program because the Commission "is a bipartisan agency, and should have a personnel policy free of involvement by the executive branch." 125 Cong. Rec. 36,754 (1979) (statement of Sen. Pell). *See also* 125 Cong. Rec. 37,197 (1979) (statement of Rep. Thompson). This comprehensive congressional plan to insulate the enforcement of the Act from partisan influence clearly supports giving effect to the text of section 437d(a)(6) by recognizing the Commission's authority to control its litigation at all judicial levels, independent of the Department of Justice.

More specifically, at the same time Congress enacted section 437d(a)(6), it also enacted 2 U.S.C. § 437h. That unusual provision authorizes "[t]he Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President" to "institute such actions . . . as may be appropriate to construe the constitutionality of any provision of this Act," and requires the district court to "certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." As originally enacted, section

[8] This Court found the restrictions on the President's appointment of voting Commissioners invalid in *Buckley v. Valeo*, 424 U.S. at 118-141, and Congress thereafter re-established the Commission with all voting members appointed by the President, 2 U.S.C. § 437c(a)(1), but retained all the rest of these safeguards. "[E]lection campaigns are the central expression of this country's democratic ideal. It is therefore essential in this sensitive area that the system of administration and enforcement enacted into law does not provide room for partisan misuse. . . ." H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 3 (1976).

437h included another subsection providing that "any decision on a matter certified [under section 437h] shall be reviewable by appeal directly to the Supreme Court of the United States." 2 U.S.C. § 437h(b) (1970 ed. Supp. IV). Congress specifically authorized the Commission, but not the Justice Department, to litigate cases under section 437h, and even the Solicitor General's narrowly technical construction of the term "appeal" in section 437d(a)(6) supports congressional authorization of the Commission to conduct appeals of section 437h cases to this Court. *See also* pp. 23-24, *infra*.

In 1988, Congress repealed the part of section 437h authorizing mandatory appeals to this Court, so that such cases are now reviewable only under the discretionary certiorari procedure. Pub. L. No. 100-352, § 6(a), 102 Stat. 662, 663 (1988). The structure of the amended statute bolsters the conclusion, supported by the ordinary meaning of its language, that section 437d(a)(6) authorizes the Commission to litigate cases on petition for certiorari. After the 1988 amendment, section 437h still specifies that the Commission is the only governmental entity eligible to invoke its procedures, and it still provides that the *en banc* court of appeals is to be the *initial* adjudicator, so that the *only* appellate review possible in such cases is in this Court on writ of certiorari. In these circumstances, section 437d(a)(6) has to be construed to include petitions for certiorari if effect is to be given to its language authorizing the Commission to "appeal *any* civil action in the name of the Commission" (emphasis added).[9]

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[9] Repeal of the mandatory appeal provision of section 437h was part of an omnibus statute to reduce the burden on this Court by curtailing mandatory appeals and providing broader discretion in selecting cases to review. *See* S. Rep. No. 100-300, 100th Cong., 2d Sess. 1-3, 6 (1988). Nothing in the language or legislative history of this statute remotely suggests that Congress contemplated transferring litigation authority from the Commission (or any other agency) to the Solicitor General.

B. The Legislative History of Section 437d(a)(6)

Justice Holmes' venerable dictum that "a page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), has particular force here, for the Commission was fashioned as a direct response to the trauma of Watergate, still considered "the most infamous political scandal in our nation's history." *United States v. Wood*, 6 F.3d 692, 696 (10th Cir. 1993). The lengthy hearings of the Senate Watergate Committee disclosed widespread politicization of government operations to serve the re-election efforts of President Nixon, including official actions by the Attorney General. *See Final Report of the Select Committee on Presidential Campaign Activities*, S. Rep. No. 93-981, 93d Cong., 2d Sess. 127-29, 145-47, 699-729, 980-98, 1184-87 (1974). The Watergate Committee concluded that "[p]robably the most significant reform that could emerge from the Watergate scandal is the creation of an independent nonpartisan agency to supervise the enforcement of the laws relating to the conduct of elections." *Id.* at 564.

The language in section 437d(a)(6) originated in S. 372, which was passed by the Senate in 1973, in the midst of the Watergate investigation, but was never taken up by the House. S. 372 was reported by the Commerce Committee with language creating an independent Federal Election Commission to "allay any misgivings that campaign laws are not being uniformly [sic] and consistently enforced," S. Rep. No. 93-170, 93d Cong., 1st Sess. 15 (1973), and was referred for hearings before the Committee on Rules and Administration. Section 309(a)(7) of the bill would have granted the Commission the power

> to initiate (through civil proceedings for injunctive relief and through presentations to Federal grand juries), prosecute, defend, or appeal any court action in the name of the Commission for the purpose of

> enforcing the provisions of title I and this title through its General Counsel. . . .

S. Rep. No. 93-170, at 35.[10]

During the hearings before the Rules and Administration Committee, witness after witness stressed the importance not only of establishing an independent agency, but of removing the opportunity and appearance of partisan enforcement of the campaign finance laws, to serve the interest of the President and his party, by taking it out of the hands of the Justice Department. As Senator Stevenson put it:

> At present the Justice Department is charged with responsibility for prosecuting campaign financing abuses and for enforcing election laws.
>
> This system has one overwhelming defect: the temptation to enforce the law in partisan and discriminatory ways, ignoring violations by one's own party members and either aggressively pursuing violations by the opposition, or holding back for fear that prosecutions will look politically motivated. Even if the Justice Department were capable of absolutely evenhanded enforcement, its every action would be open to charges and insinuations of partisanship.
>
> This is a clear argument for insulating the enforcement of election laws from partisan influences. Our bill, if enacted, would achieve that end.

1973 Hearings at 186.[11]

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[10] This language appears to have been taken from S. 1094, which had been introduced by Senators Scott, Stevenson, and Mathias. *See Federal Election Reform, 1973: Hearings before the Subcommittee on Privileges and Elections and the Committee on Rules and Administration*, 93d Cong., 1st Sess. 108-114 (1973) (hereafter "*1973 Hearings*").

[11] *See also, e.g., 1973 Hearings* at 17 (Sen. Mathias) ("This amendment takes the enforcement of the election process out of the hands of the Department of Justice and thus out of the political arena."); *id.* at 160 (Sen. Cannon) ("Had that Federal Election Commission been in operation prior to the 1972 election, it is my judgment that that Commission . . . could very well have acted forcibly and effectively to reassure the public that our laws are being observed and enforced. It is not possible under the law we enacted."); *id.* at 177 (Sen. Bayh) ("I don't care whether it is a Republican administration or a Democratic administration, the temptation is going to be there in the Justice Department not to prosecute election violations against some of your own party faithful"); *id.* at 233 (Sen. Cannon) (independent commission with enforcement authority needed to avoid "a 'fox watching the henhouse' sort of situation").

The only opposition to removing enforcement of the FECA from the Justice Department came from the Justice Department itself. Assistant Attorney General Robert O. Dixon, Jr., raised two objections to the independent litigating authority to be given the Commission. He argued, first, that the bill's assignment of criminal prosecution authority to an independent agency would be unconstitutional and, second, that authorizing the Commission to appear on its own in the Supreme Court would be bad policy. *1973 Hearings* at 225-26.[12] When Dixon asked to submit a statement that had been prepared by the Solicitor General to oppose giving independent litigating authority in the Supreme Court to another agency, the request was granted without anyone's suggesting that S. 372 would not have such an effect. *Id.* at 226. The members of the Committee thus accepted Dixon's view of the bill's effect without question; Senator Pell responded that "[y]our statement was excellent and its points will be considered by this committee." *Id.* at 227. Senator Cannon pressed Dixon on his constitutional objection, but showed no interest in his policy objections to granting the Commission

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[12] "It should be noted, moreover, that the Commission's litigating authority would extend to the Supreme Court. This attempt to divest the Solicitor General of longstanding jurisdiction to handle Supreme Court litigation on behalf of the United States would be contrary to the best interests of both the Federal Government as a major litigant before the Supreme Court, we feel, and of the Court itself." *1973 Hearings* at 226.

authority for Supreme Court litigation. *1973 Hearings* at 233.[13]

The Committee reported S. 372 with no changes to section 309(a)(7) in response to Dixon's objections, finding that "[a] separate entity, not so closely aligned with the Chief Executive of the United States, or with the Congress, and charged with the duty of carrying out the responsibilities given it by law can be expected to carry out those obligations quickly, efficiently, and impartially." S. Rep. No. 93-310, 93d Cong., 1st Sess. 4 (1973).[14]

During the floor debate, the prophylactic purpose of this provision to establish the Commission's complete independence from the Justice Department in enforcing the FECA was repeatedly emphasized. In particular, Senator Bayh engaged Senator Cannon in a colloquy to clarify that this was intended to be an exception to the Attorney General's authority under 28 U.S.C. § 516 to control the litigation of the United States, 119 Cong. Rec. 26,590-91 (1973),[15] and there was a sharp exchange over Senator

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[13] The Solicitor General (Br. 11 n.8) dismisses Dixon's testimony because he misquoted three words of the provision. Initially, the Solicitor General does not explain why the phrase actually used in the bill, "appeal any court action," would be any less sweeping than Dixon's version. In any event, the significance of this episode lies not in the merits of Dixon's statutory analysis, but in the Committee's acceptance of his assertion that this was the intent of the bill. It is also noteworthy that, in contrast to the Solicitor General's current argument, even under Dixon's version of the bill's wording the Justice Department's position was that the Commission would be authorized to conduct its own Supreme Court litigation by a provision that explicitly mentioned neither the Supreme Court nor petitions for certiorari.

[14] The Committee renumbered this provision as section 309(a)(6) and expanded the Commission's enforcement authority to include five pre-existing sections of Title 18 relating to federal elections. S. Rep. No. 93-310 at 32.

[15] "We all know, whether it might be as to one party or another, that we can see the possible reluctance of bringing before the bar of justice those whose beneficence happened to help the party which

McClellan's objection to depriving the Attorney General of the usual authority to conduct law enforcement litigation. 119 Cong. Rec. 26,608-10 (1973).[16] The bill was then adopted by a vote of 82-8. 119 Cong. Rec. at 26,613.

The House did not consider S. 372, and a few months later the provisions from that bill establishing the Federal Election Commission were incorporated without relevant change into S. 3044, which was introduced on February 21, 1974. *See* S. Rep. No. 93-689, 93d Cong., 2d Sess. 2, 4 (1974). The final legislation enacted in 1974 created an independent Federal Election Commission largely as described in the language of this Senate bill. In particular, the wording of section 309(a)(6) from the 1973 Senate bill defining the Commission's independent litigating authority was retained for civil actions, and the Justice Department's enforcement authority was thus limited to criminal prosecutions.[17]

In sum, the statute enacted in 1974 transferred all civil litigation authority under the FECA from the Justice

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controlled the Department of Justice at that time." 119 Cong. Rec. at 26,491 (Sen. Bayh).

[16] "Because the office of Attorney General is in fact a political office, because so many complaints have been made, and because not a sin[g]le action has ever been brought or taken, there has been a tremendous amount of feeling that this power should be reposed in the Commission. . . . It is true that we are in a way taking some power away from the Attorney General's office. But the power that the Attorney General's office enjoys was delegated by Congress; and Congress can modify it, improve it, add to it, and subtract from it. In this particular instance, we have subtracted from it." 119 Cong. Rec. at 26,610 (Sen. Pastore).

[17] The statute as enacted authorized the Commission to "appeal any civil action," instead of the authorization in S. 372 to "appeal any court action," and the other references to criminal procedures were omitted from it. The provision as enacted also expanded "through civil proceedings for injunctive relief" to include "through civil proceedings for injunctive, declaratory, or other appropriate relief," and it was expanded to include civil litigation under the presidential public financing statutes codified in Title 26. 2 U.S.C. § 437d(a)(6) (1970 ed. Supp. IV).

Department to the Commission. Complete independent civil litigating authority at all levels of the judiciary was authorized, as originally proposed in the 1973 bill, in order to insulate enforcement of the Act from partisan influence. This legislative history confirms that Congress intended just what the normal meaning of the text of section 437d(a)(6) indicates—that the Commission has complete independent authority to conduct all aspects of its civil litigation under the FECA without supervision from the Department of Justice.

II. THE GRANT OF INDEPENDENT LITIGATING AUTHORITY IN 2 U.S.C. § 437d(a)(6) IS NOT LIMITED BY THE SEPARATE GRANT OF LITIGATING AUTHORITY IN TITLE 26

A. The Separate Provisions in Title 26 Were Not Designed to Limit the Scope of 2 U.S.C. § 437d(a)(6)

Lacking support in the language, structure, or legislative history of the FECA, the Solicitor General's argument rests in the end upon a superficial application of the maxim *expressio unius est exclusio alterius*. The presidential public financing statutes, 26 U.S.C. §§ 9010(d), 9040(d), also grant the Commission independent litigating authority, and both of those provisions explicitly mention petitioning this Court for review. From this, the Solicitor General argues that Congress's failure to specify petitioning for certiorari in 2 U.S.C. § 437d(a)(6) indicates a congressional intention to limit the Commission's authority under the FECA to appeals of right.

The *expressio unius* maxim " 'is a questionable one in light of the dubious reliability of inferring specific intent from silence.' " *Pauley v. BethEnergy Mines, Inc.*, 111 S.Ct. 2524, 2537 (1991) (quoting Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2109 n.182 (1990)).[18] Even if it were fully applicable

[18] Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), statutory silence requires deference to an agency's construction of a statute it administers. Accordingly, courts normally should "defer to [an agency's] refusal to read the Act in the manner suggested by the *expressio* canon if its interpretation is otherwise reasonable." *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991).

here, this maxim could not overcome the direct evidence discussed above that the ordinary meaning of the language in section 437d(a)(6) includes petitions for certiorari, that Congress has used similar language elsewhere to authorize independent appeals to this Court, and that the structure of the Act is inconsistent with construing section 437d(a)(6) not to authorize petitions for certiorari. *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983); *American Trucking Ass'ns v. United States*, 344 U.S. 298, 309-10 (1953).

In this case, however, the Solicitor General is comparing apples with oranges. The provisions he cites are from separate statutes codified in different Titles of the United States Code, they were drafted by different Congresses in different years, and they were originally written to apply to different agencies of the government. The provision codified at 26 U.S.C. § 9010(d) was part of the Presidential Election Campaign Fund Act enacted in 1971, before Watergate and the creation of the Federal Election Commission. Revenue Act of 1971, Pub. L. No. 92-178, title VIII, § 801, 85 Stat. 497, 570 (1971). That statute, which provided public financing of the general election campaign for President, was to be administered by the Comptroller General, and it was for him that section 9010(d) was drafted. As discussed *supra*, pp. 15-20, 2 U.S.C. § 437d(a)(6) was drafted in 1973, in the midst of the Watergate controversy, as part of a bill intended to restore public confidence in the evenhanded enforcement of the FECA by transferring this function from the Justice Department to a nonpartisan, independent commission. The 1973 bill would not have assigned the Commission any responsibility with respect to the previously enacted Presidential Election Campaign Fund Act. Since this bill

had nothing to do with the presidential public financing statute administered by the Comptroller General, its drafters had no occasion to compare the language of these two provisions.

In 1974, when the bill establishing the Commission was finally enacted, Congress transferred administration of the presidential public financing statute to the Commission, in addition to the responsibility for enforcing the FECA's comprehensive regulation of the financing of both presidential and congressional election campaigns. However, Congress did not redraft the Presidential Election Campaign Fund Act to coordinate its choice of language with the new provisions of the FECA establishing the Commission. Instead, it simply replaced references to the Comptroller General in most of its provisions, including section 9010(d), with references to the Commission. Pub. L. No. 93-443, § 404(c), 88 Stat. 1292-93 (Oct. 15, 1974). The language of section 9010(d) was simply incorporated into section 9040(d) of the Presidential Primary Matching Payment Account Act, also enacted in 1974, *id.*, § 408(c), 88 Stat. 1302, and section 437d(a)(6) was expanded to cover both of the public financing statutes as well. Thus, the legislative history does not support the Solicitor General's assumption that, by transferring to the Commission the litigating authority previously assigned to the Comptroller General, Congress somehow intended to restrict the broad authority given the Commission in 2 U.S.C. § 437d (a)(6).

The Solicitor General notes (Br. 10) that there is one section of the FECA itself that also mentions certiorari: 2 U.S.C. § 437g(a)(9), which provides that a court of appeals judgment in litigation under section 437g "shall be final, subject to review by the Supreme Court . . . upon certiorari or certification as provided in" 28 U.S.C. § 1254. However, section 437g(a)(9) only defines the *procedure* for seeking review in this Court and does not address the question of litigating authority at all. This provision thus stands in contrast not with section 437d (a)(6), but with the mandatory appeal procedure originally included in section 437h. 2 U.S.C. § 437h(b) (1970 ed., Supp. IV). We have already shown, moreover, that the language of section 437d(a)(6) applies to both mandatory and discretionary procedures for seeking review. *See* pp. 10-12, *supra*. In fact, the language of section 437g(a)(9) could not have been designed to contrast with the language giving litigating authority to the Commission in section 437d(a)(6), for the language in section 437g(a)(9) was enacted as part of the 1971 version of the FECA, before the creation of an independent Federal Election Commission, when all of the enforcement litigation was supposed to be conducted by the Justice Department itself. Pub. L. No. 92-225, § 308(d)(4), 86 Stat. 18 (Feb. 7, 1972).

B. The Solicitor General's Construction Would Create an Unworkable Statutory Scheme

The Solicitor General's *expressio unius* theory would create an anomalous patchwork of litigating authority that could not have been intended by Congress.[19] For example, the Commission has overlapping authority to pursue injunctive relief for violations of the presidential public financing statutes under both Title 2 and Title 26. *See* 2 U.S.C. §§ 437d(a)(6), 437g(a)(6); 26 U.S.C. §§ 9010 (c), 9011(b), 9040(c). Under the Solicitor General's theory, the Commission's authority to control such litigation at the Supreme Court level would depend entirely upon the fortuity of which of these available options the Commission chooses to invoke. If the Commission elects to rely on *both* of these complementary statutes as author-

[19] " '[The *expressio unius* maxim] is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The 'exclusio' is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application . . . leads to inconsistency or injustice.' " *Ford v. United States*, 273 U.S. 593, 612 (1927) (citation omitted). *See also Pauley v. BethEnergy Mines*, 111 S.Ct. at 2537 (rejecting " 'absurd or futile results' " (citation omitted)).

ity for an injunction in such a case, the Solicitor General's theory would result in a redundant and conflicting assignment of authority to both agencies at once.

A similar conflict of authority would result within the FECA itself. As this Court pointed out in *California Medical Ass'n v. FEC*, 453 U.S. 182, 187-89 (1981), the FECA "provides two routes by which questions involving its constitutionality may reach this Court." Such questions can be raised either as an affirmative defense in an enforcement suit brought by the Commission pursuant to 2 U.S.C. § 437g, over which the Solicitor General claims authority at the Supreme Court level, or in a separate action for declaratory judgment under the special procedures of 2 U.S.C. § 437h, which was assigned by Congress in 1974 to the Commission's control at all judicial levels even under the Solicitor General's narrow construction of the language of section 437d(a)(6) (see pp. 13-14, *supra*). The Solicitor General's theory thus attributes to Congress a peculiar scheme whereby the fortuity of which procedure is invoked determines whether the Commission or the Solicitor General controls litigation of the same issue in the Supreme Court. This result is especially anomalous in light of the heavily fact-specific nature of a section 437g proceeding compared with the focus on broad constitutional questions in a section 437h proceeding. Worse, this Court held in *California Medical Ass'n*, 453 U.S. at 189-92, that defendants in enforcement suits filed under section 437g can invoke section 437h to divert litigation of their constitutional defenses into that provision's expedited procedures. The Solicitor General's theory would, therefore, place in the hands of defendants the means to determine who will represent the government, and thus determine its positions and arguments, when such constitutional defenses reach the Supreme Court.[20] Such a scheme is too bizarre to attribute to Congress.

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[20] In fact, the constitutional issues in this case could just as easily have been certified to the court of appeals under the procedures of section 437h, at the option either of the Commission or of the individual defendant.

In sum, the language, structure, and legislative history of the FECA all support continuing to recognize the Commission's statutory authority to litigate cases under that Act in the Supreme Court without authorization from the Justice Department, as it has done for almost two decades. The Solicitor General acknowledges (Br. 12) that such independent litigating authority is supported by substantial policy considerations unique to this agency, considerations that we have shown above to have been the motivating concerns of Congress in removing this litigation from the Department of Justice. The overlapping and conflicting litigating authority that would result from the Solicitor General's theory actually runs counter to the usual justification for centralizing control of Supreme Court litigation in the Solicitor General, namely, ensuring "that the United States usually should speak with one voice before this Court." *Providence Journal*, 485 U.S. at 706.[21]

The Commission's construction of section 437d(a)(6) as authorizing the independent litigation in this Court that the Commission has been conducting for almost two decades suffers from none of these defects. Accordingly, there being no substantial basis for refusing to accept the Commission's longstanding construction of the statute it administers, the Court should construe section 437d(a)(6) to authorize the Commission to continue conducting litigation in this Court, under Title 2 as well as Title 26, without the supervision of the Department of Justice.

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[21] The Commission's authority to file petitions for certiorari in cases under Title 2 has not resulted in an undue burden on this Court. This case is only the eighth time in its 19-year history that the Commission has petitioned for certiorari in a case under Title 2. The Commission has also filed one mandatory appeal in a Title 2 case, and one petition for certiorari and two mandatory appeals in cases under Title 26, all of which would be within its authority even under the Solicitor General's construction.

CONCLUSION

The Court should rule that the Federal Election Commission has statutory authority to litigate this case in this Court without the authorization of the Solicitor General, and proceed to consider the petition for certiorari filed by the Commission.

Respectfully submitted,

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May 31, 1994

APPENDICES

APPENDIX A

2 U.S.C. § 437h (1970 ed. Supp. IV):

§ 437h. Judicial review.

(a) Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc.

The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18. The district court immediately shall certify all questions of constitutionality of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18, to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) Appeal to Supreme Court; time for appeal.

Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) Advancement on appellate docket and expedited disposition of certified questions.

It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

APPENDIX B

FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

May 25, 1989

Thomas Merrill
Deputy Solicitor General
Room 5137
Department of Justice
10th & Constitution Avenues, N.W.
Washington, D.C. 20530

RE: *Austin, et al. v. Michigan State Chamber of Commerce,* No. 88-1569 (Supreme Court)

Dear Mr. Merrill:

Pursuant to your suggestion in our telephone conversation, I have reviewed with the Commission's General Counsel your concerns regarding the Commission's authority to represent itself in this case in the role of an *amicus curiae.* I am writing to explain why we believe the Commission has the authority to do so, and to inform you that we do intend to file an *amicus* brief on behalf of the Commission in this case by the current due date of June 29.

As you are aware, Congress expressly authorized the Commission to represent itself in the federal courts in all civil litigation involving the Act. 2 U.S.C. § 437c(f)(4). Congress did not, however, limit the Commission's litigating authority to matters arising from the Commission's administrative activity. In addition to the authority to initiate, defend and appeal civil actions to enforce the Act, 2 U.S.C. § 437d(6), in 2 U.S.C. § 437h and 26 U.S.C. § 9011(b) Congress named the Commission, rather than the Department of Justice, to litigate questions of the constitutionality of the Act under the special procedures it had devised for these important issues.

The Commission has consistently fulfilled this responsibility to defend the constitutionality of the Act and the public financing statutes, in cases in which the Commission was a named defendant under the special provisions of sections 437h and 9011(b), *e.g. California Medical Association v. FEC,* 453 U.S. 182 (1981); *Republican National Committee v. FEC,* 487 F. Supp. 280 (S.D.N.Y. 1979) (three-judge court); 616 F.2d 1 (2d Cir. 1979) (en banc), *aff'd mem.,* 445 U.S. 955 (1980); *International Association of Machinists v. FEC,* 678 F.2d 1092 (D.C. Cir. 1982) (en banc), *aff'd mem.,* 459 U.S. 983 (1982); *Bread Political Action Committee v. FEC,* 455 U.S. 577 (1982); *Athens Lumber Company, Inc. v. FEC,* 689 F.2d 1006 (11th Cir. 1982), 718 F.2d 363 (11th Cir. 1983) (en banc), *cert. denied,* 465 U.S. 1092 (1984), and in cases in which constitutional defenses were raised in enforcement actions filed under sections 437g and 437d(b), *e.g., National Right to Work Committee v. FEC,* 459 U.S. 197 (1982); *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986); *FEC v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980) (en banc); *REC v. Hall-Tyner Election Campaign Committee,* 678 F.2d 416 (2d Cir. 1982), *cert. denied,* 459 U.S. 1145 (1983); *FEC v. Lance,* 617 F.2d 365 (5th Cir. 1980), *aff'd,* 453 F.2d 1132 (5th Cir.) (en banc), *cert. denied,* 453 U.S. 917 (1981); *FEC v. Furgatch,* 807 F.2d 857 (9th Cir.) *cert. denied,* 108 S.Ct. 151 (1987). In addition, the Commission has intervened in two cases being litigated by others under 26 U.S.C. § 9011(b) to defend the constitutionality of the public financing statutes. *See, Common Cause v. Schmitt,* 512 F.Supp. 489 (D.D.C. 1980) (three judge court), *aff'd by an equally divided Court,* 455 U.S. 129 (1981); *FEC v. National Conservative Political Action Committee,* 470 U.S. 480 (1985). Finally, the Commission has appeared before as an *amicus* in a case challenging the constitutionality of a state statute containing provisions that appeared to parallel those

of the Act. *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978).

Independent litigating authority is usually granted to an agency because of its expertise in a specialized area of law. The Commission's particularly broad independence also derives from the fact that Congress established it as a uniquely bipartisan agency—a six member body with no more than three members belonging to any one political party. 2 U.S.C. § 437c(a)(1). It was thought that such a body was necessary to ensure that the resolution of sensitive election law issues could not be tainted by partisan bias. In contrast, as a political agency subject to the control of the incumbent President, the Department of Justice has an inherent conflict of interest with respect to what are often highly partisan issues in the area of campaign finance law. This concern is not merely an abstract one. We have often engaged in litigation against members or committees of a sitting President's party, and have several times litigated against a sitting President's own campaign committee. *See In re Carter-Mondale Reelection Committee, Inc.,* 642 F.2d 538 (D.C. Cir. 1980); *Reagan For President Committee v. FEC,* 734 F.2d 1569 (D.C.Cir. 1984); *Reagan-Bush Committee v. FEC,* 525 F.Supp. 1330 (D.D.C. 1981). Moreover, in several cases the Department of Justice has actually litigated against the Commission, twice seeking to have portions of the Act defended by the Commission declared unconstitutional. *See Buckley v. Valeo,* 424 U.S. 1 (1976); *Clark v. Valeo,* 559 F.2d 642 (D.C. Cir.) (en banc), *aff'd mem. sub nom. Clark v. Kimmit,* 431 U.S. 950 (1977); *Galliano v. United States Postal Service,* 836 F.2d 1362 (D.C.Cir. 1988).

We see no reason why Congress' choice of the Commission as the primary agency to defend the constitutionality of the Act, and the purposes served by that choice, would be inapplicable merely because the constitutional issue arises in a case reviewing a state statute modeled on the Act rather than a direct attack on the Act itself.

The Act's failure to address this situation explicitly does not, in our view, reflect a Congressional decision to deny the Commission authority to file an *amicus* brief in a case like this to apprise the Court of the Commission's view as to why the Act, and the state statute modeled on it, are constitutional. The provisions of the Act clearly reflect Congress's intent to grant the Commission independent authority to conduct every sort of civil litigation regarding the campaign finance laws that it anticipated would arise; if the role of an *amicus* in a case like this one had been discussed, there is no reason to think Congress would have hesitated to assign it to the Commission as well.

It is noteworthy that, up to now, the Department of Justice has consistently supported the Commission's independence in litigating the constitutionality of the Act in all types of cases. In cases filed under section 437h, where the Attorney General as well as the Commission has been named as a respondent, the Department has usually moved to have the Attorney General dismissed as a party on the ground that the Commission, rather than the Attorney General, was chosen by Congress to defend the constitutionality of the Act. When such motions have failed, the Department has usually filed briefs simply endorsing the arguments made by the Commission. In *Goland v. United States* (C.D.Cal. No. CV-89-1480-RSWL), a criminal defendant indicted for, *inter alia,* violations of the Act, filed suit against the United States under section 437h to challenge the constitutionality of the provisions of the Act relied upon in the indictment. The Department requested the Commission to intervene as a defendant to take the lead in defending the constitutionality of the Act in that case, and to file an *amicus* brief in the accompanying criminal case to oppose the defendants' motion to dismiss the indictment on the same constitutional grounds. (It should be noted in this regard that the Act says nothing explicit about the Commission's authority to file *amicus* briefs in any court in any type of

case, yet the Commission has done so recently not only in *Goland,* but at the request of the court in *Galliano v. United States Postal Service,* 836 F.2d 1362 (D.C. Cir. 1988), in which the court essentially adopted the position advanced in the Commission's brief.)

Most importantly, however, is the fact that in *Bellotti* we filed, and the Supreme Court accepted, an *amicus* brief in circumstances similar to this case, without the participation or authorization of the Solicitor General. Indeed, our records reflect that in 1977 your office agreed orally with the Commission's position that the Commission was entitled to file an *amicus* brief in the Supreme Court in the *Bellotti* case on its own authority.

Finally, we believe that *United States v. Providence Journal,* 108 S.Ct. 1502 (1988), is distinguishable from this case on a number of grounds. The most important distinctions are that the Commission is appearing only as an *amicus* rather than as a party, and that the Commission, unlike the special prosecutor appointed by the district court in *Providence Journal,* has been granted by statute independent authority to litigate in the Supreme Court. The Supreme Court accepted our *amicus* brief in the jurisdictional phase of this case, and no party objected to our filing it. It therefore appears doubtful that any objection will be raised to our *amicus* brief on the merits by the Court or the parties to the case.

I hope this letter answers your concerns. If you have any further questions or comments, please feel free to call.

Sincerely,

/s/ Richard B. Bader
RICHARD B. BADER
Associate General Counsel

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